IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH DECEMBER 2007 / 15TH AGRAHAYANA 1929

RSA.No. 1056 of 2007()

AS.57/2000 of SUB COURT,ATTINGAL
OS.452/1996 of MUNSIFF COURT,ATTINGAL
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APPELLANTS/ APPELLANTS/DEFENDANTS
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1. **KAMALAMMA, D/O.KOCHAPPI,**
   INCHIPPULLUVILA VEEDU, MUTTAPPALAM DESOM,
   AZHOOR VILLAGE.

2. **VISWADAS, S/O.SEKHARAN,**
   INCHIPPULLUVILA VEEDU, MUTTAPPALAM DESOM,
   AZHOOR VILLAGE.

3. **SAIJU, S/O.VISWADAS,**
   INCHIPPULLUVILA VEEDU, MUTTAPPALAM DESOM,
   AZHOOR VILLAGE.

4. **PRIYADARSINI, D/O.VISWADAS,**
   INCHIPPULLUVILA VEEDU, MUTTAPPALAM DESOM,
   AZHOOR VILLAGE.

5. **KAVITHA, D/O.VISWADAS,**
   INCHIPPULLUVILA VEEDU, MUTTAPPALAM DESOM,
   AZHOOR VILLAGE.

BY ADV. SRI.M.DINESH

RESPONDENTS: RESPONDENT/PLAINTIFF

THANKAPPAN, S/O.SANKU,
INCHIPPULLUVILA VEEDU, MUTTAPPALAM DESOM,
AZHOOR VILLAGE.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 06/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

R.S.A. NO. 1056 OF 2007

Dated this the 6th day of December, 2007

J U D G M E N T

Defendants in O.S. No.452/1996 on the file of the Munsiff, Attingal are the appellants. Plaintiff is the respondent. Respondent instituted the suit for declaration of title and possession of plaint schedule property, fixation of boundary, recovery of possession and for injunction. Plaint schedule property along with other properties originally belonged to Ponnu the mother, first appellant daughter, respondent son and another sister Krishnamma as allotted to their share under partition deed No.3170/1959. Subsequently under partition deed No.3184/1964 properties were divided between the mother and children. Plaint schedule property having an extent of 19 cents was allotted to the mother. Its northern 19 cents was allotted to Krishnamma and the southern 21 cents to first appellant. Thereafter, under Ext.A1 sale deed 2002 of 1970 mother sold plaint schedule property in favour of respondent. Respondent claims title to the property under Ext.A1. Subsequently under Ext.A3 he mortgaged the property in favour of Sukumaran. In 1974 on the death of Sukumaran his legal heirs released the mortgage right under Ext.A4, in favour of respondent. Thus he claims title and possession of the plaint

schedule property. First appellant after her marriage with second appellant was residing at Vakkom with appellants 3 to 5 their children. While so on the request of appellants they were permitted to reside in the house in the plaint schedule property to enable the construction of a building in the share of first appellant. Though appellants are residing in the building, they have no right to continue the residence. Respondent contended that he is entitled to a decree for fixation of the boundary of the plaint schedule property, recovery of possession of the building and injunction. Appellants resisted the suit contending that Ext.A1 sale deed was only a sham and nominal document and it is not supported by consideration and the document was created for the purpose of raising funds by mortgage of the property. Though the property was given on mortgage, possession was not handed over and mother along with the 1st appellant continued their residence in the building. Even after the marriage of appellants 1 and 2, first appellant continued residence in the building, though second appellant belongs to Vakkom. Appellants are residing in the plaint schedule property during life time of the mother and mother had given the property to the first appellant and she is enjoying the property since then. The plaint schedule property along with the property allotted to first appellant under the partition has been in the possession of appellants and therefore respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of PWs 1 to 3, Dw 1and

Exhibits A1 to A4, B1 to B5, C1 and C1(a) upholding the title of the respondent under Ext.A1 rejecting the case of appellants that Ext.A1 is a sham and nominal document found that under Ext.A1 respondent obtained title which originally vested in the mother as per the partition deed of 1964 and AD line marked by the Commissioner in Ext.C1(a) plan is the boundary separating plaint schedule property from the property of first appellant allotted to her under the partition deed. Learned Munsiff also found that appellants have no right to continue their residence in the building in the plaint schedule property and therefore respondent is entitled to the decree sought for. Appellants challenged the judgment before Sub Judge, Attingal in A.S. No.57/2000. Learned Sub Judge on reappreciaiton of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellants was heard. The argument of the learned counsel is that Ext.A1 was only a sham and nominal document. As provided under the partition deed first appellant has a right of residence in the building and respondent is therefore not entitled to the decree. Learned counsel argued that when the partition deed expressly provides that the first appellant is entitled to reside in the plaint schedule property till a building is constructed in the property allotted to her share, mother to whom plaint schedule property was allotted under the partition deed is not entitled to sell the property to the respondent and on

the evidence, courts below should have found that Ext.A1 sale deed is only a sham document and not valid and appellants are therefore entitled to continue their residence in the building and respondent is not entitled to the decree sought for.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Admittedly the whole properties originally belonged to the family of first appellant, respondent and their mother and sister Krishnamma. As per the partition deed 1959 the properties finally allotted to them. It was thereafter divided in 1964. Though the partition deed was not produced, it is the admitted case that under the said partition deed, plaint schedule property was allotted to the mother who was party No.1 therein. First appellant was party No.2 to whom B scheduled property therein was allotted. B scheduled property is the 21 cents which lies to the south of the plaint schedule property. The northern 19 cents was allotted to Krishnamma the other sister. Under the partition deed it is only the mother who had title to the plaint schedule property. The children who were separated cannot therefore claim title to the property. Under Ext.A1 sale deed mother sold the property to the respondent in 1970. Though it was contended before the courts below that Ext.A1 is only a sham and nominal document trial court as well as first appellate court on appreciation of evidence found that the contention is not correct. Execution of Ext.A1 was not disputed even in the written

statement. It was also contended in the written statement that subsequently respondent had agreed to reconvey the property to the mother and in violation of the agreement respondent did not do so. That itself establishes that Ext.A1 was not a sham and nominal document. Ext.A3 establishes that subsequent to Ext.A1, respondent mortgaged the property in favour of Sukumaran in 1974. Ext.A4 executed by the legal heirs of Sukumaran in 1990 establish that the mortgage right obtained under Ext.A3 was released by the legal heirs of the original mortgagee in 1990 in favour of respondent. On the evidence courts below found that Ext.A1 is not a sham and nominal document and respondent has title of the plaint schedule property. No evidence was adduced to prove that Ext.A1 is a sham and nominal document. Exts. A3 and A4 disprove that case. Courts below on the evidence rightly fund that respondent has title to the property.

5. Though it was vehemently argued by learned counsel that as Ext.A1 provides a right of residence in building decree for recovery of possession is not sustainable, it is seen from the written statement that such a contention was not taken. First of all without producing he partition deed on contending that under the partition deed they have a right of residence in the building till they construct a building in the property allotted to them, appellants cannot be allowed to raise a plea at the appellate stage. If the case of the appellants is that they have a right of residence

because of the said provision in the partition deed what is to be pleaded in the written statement was that they have a right of residence in the building till they construct a residential building in the property allotted to their share and as it is not constructed they have that subsisting right of residence. But there is no such plea in the written statement or evidence that first appellant did not construct a building in the property allotted to her and so they are entitled to continue the residence.

6. On the pleadings and evidence on record, I find no substantial question of law involved in the appeal.

7. Learned counsel then submitted that considering the fact that appellants have been residing in the building for all these years and as they do not have a house, they may be granted six months time to surrender the building. Evidence shows that when the properties were divided and plaint schedule property was allotted to the share of the mother, it was provided that first appellant is entitled to continue residence till she constructs a house in the property allotted to her and she is residing in the said building. In such circumstance, in the interest of justice, appellants are to be granted some more time to enable them to shift the residence. But it can be done only on terms.

Appeal is dismissed in limine. But appellants are granted four months time to surrender vacant possession of the residential building, if appellants file an affidavit before the trial court/executing court

unconditionally undertaking to surrender vacant possession of the residential building on the expiry of four months from today. The affidavit shall be filed within two weeks from today

M.SASIDHARAN NAMBIAR, JUDGE

vps